

April 25, 2006

Kent County - Civil Division (739-7641)

Mr. Max Yealey
P.O. Box 151
644 Commerce Street
Townsend, DE 19734

**RE: Freedom of Information Act Complaint
Against Town of Townsend**

Dear Mr. Yealey:

On March 7, 2006, we received your letter alleging that the Town of Townsend ("the Town") violated the Freedom of Information Act, 29 *Del. C.* Chapter 100 ("FOIA"), by: (1) posting notices of the Town Council's regular monthly meetings at the Town Hall rather than the Fire Hall where the meetings are actually held; (2) failing to give the public adequate notice of a dangerous building ordinance adopted by the Town at a workshop on January 18, 2006; (3) charging an unreasonable fee (\$1.00 per page) for copying public records; and (4) requiring a person making a request for public records to state the reason for the request. ¹

By letter dated March 20, 2006, we asked the Town to respond to your complaint by March

¹ You also question whether the Town Council can "introduce [an] ordinance and read it twice in one night?" That is an issue of municipal law which is outside our jurisdiction under FOIA.

Mr. Max Yealey
April 25, 2006
Page 2

31, 2006.² We received the Town's response on March 31, 2006. On April 3 and 4, 2006, we requested additional information from the Town which we received on April 11, 2006. On April 12, 2006, we requested additional information from the Town which we received on April 13, 2006.

According to the Town, the Town Council "has two public meetings per month. Townsend has their monthly Meeting on the first Wednesday of each month. They also have a Workshop on the third Wednesday of each month."

On December 13, 2005, the Town posted a notice and agenda for a workshop scheduled for December 20, 2005 seven days in advance as required by FOIA. According to the Town, the agenda was posted on the "front board" in the "office." Listed on the agenda for the December 20, 2005 agenda were two ordinances: 05-05 (Dangerous Buildings); and 05-06 (Access to Information under FOIA). According to the Town, the text of both ordinances was read into the record at the December 20, 2005 workshop and "then placed on the agenda for the January 4, 2006 meeting."³

On December 28, 2005, the Town posted the notice and agenda for a meeting scheduled for January 4, 2006 seven days in advance as required by FOIA. According to the Town, the notice and agenda were posted "in the Town Office, on the Town Hall information board, in the Town Post Office, and on the Town web site." According to the Town, it also published notice in a local

² By letter dated March 13, we asked the Town to respond to your complaint by March 24, 2006 but inadvertently sent the letter to a previous Town Solicitor.

³ The minutes of the December 20, 2005 workshop do not reflect any reading of the two ordinances into the record. That is consistent with the agenda and minutes for the January 4, 2006 meeting of the Town Council which show that the first reading of the two ordinances occurred at the January 4, 2006 meeting.

Mr. Max Yealey
April 25, 2006
Page 3

newspaper “that there would be a Public Hearing on these two Ordinances on January 4, 2006.” The agenda for the January 4, 2006 meeting listed: “First Reading: 05-05 -- Dangerous Buildings and 05-06 -- Access to Information under the FOIA.” The minutes of the January 4, 2006 meeting reflect that Mayor Raughley read both ordinances aloud and that the Council then voted “to accept this as the first and second reading.”

On January 11, 2006, the Town posted the notice and agenda for a workshop scheduled for January 18, 2006 seven days in advance as required by FOIA. According to the Town, the agenda was posted on the “front board” in the “office.” Listed on the agenda was “Ordinance 05-05 – Dangerous Buildings – Final Reading.” The minutes of the January 18, 2006 workshop reflect that “Councilman Estep made the motion to dispense reading the ordinance aloud to the public, for the final reading, and go ahead and approve the ordinance. Councilman Hanlin seconded the motion. Vote: Ayes – Unanimous, motion carried.”

The next meeting of the Town Council was scheduled for February 1, 2006.⁴ The agenda listed “Final Reading: Ordinance 05-06 – Access to Information under the FOIA.” The minutes of the February 1, 2006 meeting reflect that “Councilman Estep made the motion to suspend reading the ordinance aloud to the public, and to go ahead and accept ordinance 05-06 Access to Information Under the FOIA. Councilman Miller seconded the motion. Vote: 3-1. Councilman Miller then makes the motion to accept ordinance 05-06 with minor changes that need to be made in section 1.

⁴ The agenda for the February 1, 2006 meeting indicates that the Town posted it on January 27, 2006, not seven days in advance as required by FOIA. We do not direct any remediation for that violation because we determine – for other reasons – that the Town must revise the FOIA ordinance adopted at the February 1, 2006 meeting.

Vote: Ayes – Unanimous. Motion carried.”

RELEVANT STATUTES

FOIA requires a public body to give notice to the public of a regular meeting and post an agenda “at least 7 days in advance thereof.” 29 *Del. C.* §10004(e)(2). The agenda must include “a general statement of the major issues expected to be discussed at a public meeting, as well as a statement of intent to hold an executive session and the specific ground or grounds therefor . . .” *Id.* §10001(f)).

FOIA provides that “[p]ublic notice required by this subsection shall include, but not be limited to, conspicuous posting of said notice at the principal office of the public body holding the meeting, or if no such office exists at the place where meetings of the public body are regularly held, and making a reasonable number of such notices available.” 29 *Id.* §10004(e)(4).⁵

FOIA provides that “[a]ll public records shall be open to inspection and copying by any citizen of the State during regular business hours by the custodian of the records for the appropriate public body.” 29 *Del. C.* §10003(a). “Reasonable access to and reasonable facilities for copying of these records shall not be denied to any citizen.” *Id.* “Any reasonable expense involved in the copying of such records shall be levied as a charge on the citizen requesting such copy.” *Id.* §10003(a). “It shall be the responsibility of the public body to establish rules and regulations regarding access to public records as well as fees charged for copying of such records.” *Id.*

⁵ Effective January 1, 2006, S.B. 131 requires public bodies in the executive branch of State government, in addition to physical posting of meeting notices, to “electronically post said notice to the designated State of Delaware website approved by the Secretary of State.”

§10003(b).

LEGAL AUTHORITY

A. Place of Posting Meeting Notices

FOIA requires public bodies to post notice of all meetings “at the principal office of the public body holding the meeting, or if no such office exists at the place where meetings of the public body are regularly held,” 29 *Del. C.* §10004(e)(4). “The purpose of requiring conspicuous posting of notice at the public body’s principal office ‘is to ensure that no member of the public will have to search out to discover public meetings.’” *Att’y Gen. Op.* 97-IB13 (June 2, 1997) (quoting *Att’y Gen. Op.* 96-IB26 (July 25, 1996)).

According to the Town, it posts notices of Council meetings at the Town Hall on a bulletin board inside the front door and in a glass-enclosed board on the front of the building. According to the Town, the Town Hall is the principal office of the Council because that is where the Council chambers are located. The Town Council meets in chambers for its monthly workshops because they are lightly attended. For the regular monthly meetings of the Council, the meetings are held at the Fire Hall to accommodate more people. The Town’s practice is in keeping with our previous determinations that if “a public body has reason to know that a large number of citizens is likely to attend a meeting, then FOIA requires the public to find another, larger place for the meeting.” *Att’y Gen. Op.* 02-IB09 (Apr. 12, 2002).

You contend that FOIA requires the Town to post notices at the Fire Hall because that is where the Council actually meets for its regular monthly meetings. We do not agree. FOIA requires

the Town to post meeting notices at the Town's "principal office." The Town Council's principal office is the Town Hall. FOIA would require the Town to post notice at the Fire Hall only if it did not have a principal office.

We determine that the Town complied with the public notice requirements of FOIA by posting notice of Council meetings at the Town Hall. ⁶

B. Workshops

"FOIA does not distinguish between a workshop and a regular meeting of a public body. Both are subject to the same public notice requirements." *Att'y Gen. Op.* IB32 (Dec. 20, 2005) (citing *Levy v. Board of Education of Cape Henlopen School District*, C.A. No. 1447, 1990 WL 154147 (Del. Ch., Oct. 1, 1990) (Chandler, V.C.)).

You contend that the Town did not give adequate notice to the public that it would vote to approve Ordinance 05-05 – Dangerous Buildings at a workshop on January 18, 2006. The agenda for that workshop listed under "Old Business" the "Final Reading" of Ordinance 05-05. According to the Town, it has an historical practice of publicly reading proposed ordinances three times before voting to approve or disapprove the ordinance, but three readings is not legally required by municipal law. The minutes of the January 18, 2006 workshop reflect that a motion was made to dispense with

⁶ We note that the Town also publishes notices of Council meetings in the local newspaper (*Middletown Transcript*) and on the Town's website. The notice requirements of FOIA are not satisfied by posting notice of a meeting that way, though we commend the Town for providing the public with a variety of notices. "While public bodies are encouraged to give notice in different forms, many citizens rely on visits to the bulletin board outside a public body's regular meeting place for their notice of upcoming meetings." *Att'y Gen. Op.* 01-IB10 (June 12, 2001).

the third reading of Ordinance 05-05 and the Council then voted unanimously to adopt the ordinance.

In *Att’y Gen. Op.* 05-IB32 (Dec. 20, 2005), the school district posted an annual notice of its meetings and workshops (date and time only) and then posted another notice seven days in advance with the agenda. At one of the workshops, the school district approved a change order in a construction contract. Our Office determined that “[b]y distinguishing between regular meetings and workshops, the School District suggested to the public that the workshops were informational only for public input on issues that would be addressed and acted upon later at a regular meeting. We determine that, in this way, the School District violated the public notice requirements of FOIA.”

The facts are different here. The Town posted only one notice for the January 18, 2006 workshop and it listed “Ordinance 05-05 – Dangerous Buildings – Final Reading.” We believe that was sufficient notice to the public that the Council would discuss the dangerous buildings ordinance.

⁷ We do not believe that FOIA’s agenda requirement to list a “general statement” of the “major issues” to be discussed required the Council “to state all of the consequences which may necessarily flow from the consideration of the subject stated.” *Att’y Gen. Op.* 05-IB30 (Oct. 24, 2005) (quoting *Texas Turnpike Authority v. City of Fort Worth*, 554 S.W.2d 675, 676 (Tex. 1977)). “As long as a reader is alerted to the topic for consideration, it is not necessary to state all of the consequences which may flow from consideration of the topic.” *Att’y Gen. Op.* 05-IB31 (quoting *Cox Enterprises*,

⁷ It is also important to note that, as reflected in the minutes of the Town Council’s February 1, 2006 meeting, “the town has been trying to pass the 05-05 Dangerous Buildings Ordinance for close to seven (7) years, so this is not something the town just came up with, it has been in the works for a while.”

Mr. Max Yealey
April 25, 2006
Page 8

Inc v. Board of Trustees of the Austin Independent School District, 706 S.W.2d 956. 958 (Tex. 1986)).

We determine that the agenda for the Town Council's January 18, 2006 workshop sufficiently notified the public that the Council would discuss the dangerous buildings ordinance. FOIA only requires an agenda to include a general statement of the major issues to be discussed. We do not believe that FOIA required the Town to detail in the agenda for the January 18, 2006 workshop every possible course of action it might take in discussing the dangerous buildings ordinance.

C. Copying Charges

Town Ordinance 05-06 provides: “The requesting person will be required to pay the Town \$1.00 per page for any copying or printing that is required to fulfill the request.” The Town takes the position that this a “reasonable” fee authorized by FOIA.

“FOIA allows a public body to charge a reasonable expense involved in the copying of public records.” *Att’y Gen. Op.* 05-IB06 (Mar. 9, 2005). Our Office has adopted, as a benchmark of reasonableness, “what the courts in Delaware now charge (Superior Court, \$1.50 per page; Family Court, \$1.50 per page).” *Id.*

We determine that the Town’s \$1.00 per page copying cost is reasonable under FOIA. We encourage the Town to adopt a “hardship” exception like many other public bodies do. For example, the policy of the Department of Justice states that it “may waive or reduce the charge for copying where special circumstances appear and the public interest would be served.”

D. Purpose of the FOIA Request

The Town’s FOIA Information Request Form has a section, “Reason Request Is Being Made.” The Town contends that FOIA does not prohibit a public body from requesting a citizen to state the purpose of a FOIA request for public records. According to the Town, “[t]here are several reasons” justifying a statement of purpose: (1) “to determine if it was a sufficient public interest request to allow waiving the copying fee”; (2) to give the Town an indication as to what the public is concerned about, so the Town can be responsive to the concerns of its citizens”; and (3) “to try and determine if the request was responsible or frivolous. This distinction is important to determine

Mr. Max Yealey
April 25, 2006
Page 10

how far the Town is required to go in filling the request.” Like many public bodies, the Town requires a person making a FOIA request for public records to fill out a written form. “FOIA is silent as to whether a public body can require a citizen to make a written request to inspect and copy public records before honoring the request.” *Att’y Gen. Op. 97-IB14* (July 29, 1997). “But if a public body chooses to require that the request be made in writing, . . . then that, in itself, does not amount to a violation of the public records law.” *Id.*

Your complaint raises a legal issue our Office has not addressed before: under FOIA, can a public body require a person to state the purpose for his or her request for access to public records? It does not appear from your complaint that the Town denied you access to public records because you refused to state the purpose of your request. According to the Town, “No request has ever been denied because of the answer to the Reason for Request question. Mr. Yealey’s request for information was denied because he refused to pay the posted copying fee, not because he refused to give a reason for his request.”

It might appear that this issue is not yet ripe for decision. Our Office is aware, however, that the forms used by a number of other public bodies to process FOIA requests have a section requiring the person to state the purpose of the request. Because of the importance of this issue to the public, we believe it is important to address it now.

The public records laws in some states expressly provide that the identity of the requestor and purpose of the request are irrelevant.⁸ Even where the public records law is silent, the courts in

⁸ See, e.g., Wis.Stat. Ann. §19.35(i) (no request “may be refused because the person making the request is unwilling to be identified or to state the purpose of the request”); Rev. Code Wash. §41.170.270 (“Agencies shall not distinguish among persons requesting

other states have held that governmental bodies cannot inquire into the purpose of a public records request. *See State ex rel. Consumer News Services, Inc. v. Worthington City Board of Education*, 776 N.E.2d 82, 90 (Ohio 2002) (“purpose in requesting to inspect and copy public records is irrelevant”); *Coleman v. Boston Redevelopment Authority*, 809 N.E.2d 538, 542 (Mass. App. 2004) (“there is no requirement of ‘standing’ by the person who requests production of records or any issue about the person’s motives or purpose in making the request”); *Lorei v. Smith*, 464 So.2d 1330 (Fla. App. 1985) (the purpose of a FOIA request “is immaterial”); *Guard Publishing Co. v. Lane County School District*, 791 P.2d 854, 855 n.1 (Or. 1990) (“no requirement that a person requesting inspection of a public record state a purpose for the request”); *Associated Tax Service, Inc. v. Fitzpatrick*, 372 S.E.2d 625, 629 (Va. 1988) (“the purpose or motivation behind a request is irrelevant to a citizen’s entitlement to requested information”).

Similarly, under the federal FOIA the government’s decision to allow access to records “cannot turn on the purposes for which the [FOIA] request for information is made” and “the identity of the requesting party has no bearing on the merits of his/her FOIA request.” *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 771 (1988).

There are strong public policy reasons why a public body should not be allowed to require a person to state the purpose for a FOIA request. Such a requirement could have a chilling effect on

records, and such persons shall not be required to provide information as to the purpose of the request”); Pa.Stat. §66.2 (“A written request need not include any explanation of the requestor’s reason for requesting or intended use of the records.”); Mass. Code Reg. §32.05(5) (“A custodian may not require the disclosure of the reasons for which a requestor seeks access to or a copy of a public record. A custodian shall not require proof of the requestor’s identity prior to complying with requests for copies of public records.”).

persons exercising their rights under FOIA, and gives rise to the potential for discriminatory treatment. Under FOIA, a record is public or it is not. FOIA does not give the Town any authority to withhold public records because the Town believes the request is “irresponsible” or “frivolous.” If the Town wants to encourage citizens to apply for a waiver of copying costs, then it can do so in ways that do not require a statement of purpose (*e.g.*, by checking a “financial hardship” box).

To inquire into a requestor’s purpose would turn FOIA into a battleground for disputes. Every time a person requested information, the public body could challenge the person’s motivation. Even a person who professed a public purpose at the time of making a request might be challenged on the basis of having an ulterior motive. The inevitable delays of such a system would frustrate the statute’s purpose of “easy access to public records.” 29 *Del. C.* §10001.

We determine that, with one narrow exception,⁹ the purpose of a FOIA request for records is irrelevant and a public body cannot ask the reason for the request or condition the processing of a request on a statement of purpose by the requestor. We also believe that the mere existence of a purpose section on a FOIA request form could have a chilling effect. Any public body using such a form should amend it as soon as possible to delete that section.

⁹ The Delaware courts have held that FOIA’s pending/potential litigation exemption for records, 29 *Del. C.* §10002(g)(9), turns on the status of the requestor as a litigant and the requestor’s “purpose for seeking information” to circumvent the civil discovery rules. *Mell v. New Castle County*, 835 A.2d 141, 147 (Del. Super. 2003) (Slights, J.). The exemption does not apply when the request is not for a litigation purpose. *See Att’y Gen. Op.* 04-IB20 (Nov. 16, 2004) (county cannot invoke the pending litigation exemption against a reporter “because you are not a litigant, and there is no evidence that you are trying to use FOIA to circumvent the civil discovery rules”).

E. Identification

The Town's FOIA policy requires the requesting party to

show proof of being either a Delaware resident or a Delaware corporation. A New Jersey resident has as no right to see Townsend records under the Delaware law. Even a corporation registered in Maryland that owns property and does substantial business in Delaware, does not have a right to see this information.

In accordance with that policy, the Town's FOIA Information Request Form requires "Proof of Delaware residency."

Under FOIA a public body cannot require the requestor to provide identification. Until last year, public bodies in Delaware could require proof of identification because FOIA limited access to public records to "citizens" of the state. In an opinion dated May 13, 2005, the federal district court held that the "citizens only" standing of Delaware's public records law violated the privileges and immunities clause of the U.S. Constitution. *Lee v. Minner*, 369 F. Supp. 2d 527 (D. Del. 2005) (Farnan, J.). The case is on appeal, but until such time as it might be reversed, public bodies in Delaware cannot condition access to public records on the requestor's citizenship.

F. Remediation

As remediation, we direct the Town to revise its FOIA policy (Ordinance 05-06) to delete Paragraph 4)a. and to revise its FOIA Information Request Form to delete “Proof of Delaware Residency” and “Reason Request Is Being Made.”

We also direct the Town to revise its FOIA policy to delete the second sentence of Paragraph 4) b. (“If the requested information is copious or to [sic] burdensome to comply with, the request can be denied.” Delaware’s FOIA does not contain an exception to disclosure for a request a public body may find burdensome or time-consuming. Whether a request sufficiently describes the public records sought, so that they can be located with reasonable effort, is a distinct issue from whether there might be administrative burden involved. A public body may have legitimate grounds not to honor a FOIA request if it is so vague that the body “does not know what [the requestor] wishes to see or where to locate it.” *Sears v. Gottschalk*, 502 F.2d 122, 125-26 (4th Cir. 1974), *cert. denied*, 425 U.S. 904 (1976). But it is not a lawful ground to withhold access to public records simply to cite “the sheer bulk of the material to which access was sought and the accompanying expense and inconvenience of making it available for inspection, . . .” *Id.*

CONCLUSION

For the foregoing reasons, we determine that: (1) the Town did not violate the public notice requirements of FOIA by posting the notices and agendas for its meetings at the Town Hall as opposed to the Fire Hall where the meetings were held; (2) the Town gave sufficient notice in the agenda for the January 18, 2006 workshop that the Council would discuss the dangerous buildings ordinance; and (3) the Town did not deny reasonable access to public records under FOIA by charging \$1.00 per page for copying.

We determine that the Town's FOIA policy and FOIA Information Request Form violate the public records law by: (1) requiring proof of identification as a Delaware resident; (2) requiring the requestor to state the reason for the request; and (3) by providing for the denial of a FOIA request on the sole basis that the Town deems it "copious or burdensome." As remediation, we direct the Town within thirty (30) days of the date of this determination to hold a meeting in accordance with FOIA to make these changes. We direct the Town Solicitor to

Mr. Max Yealey
April 25, 2006
Page 16

report back to our Office in writing within ten days of that meeting to confirm that remediation is completed.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED

Lawrence W. Lewis, Esquire
State Solicitor

cc: The Honorable Carl C. Danberg
Attorney General

Malcolm S. Cobin, Esquire
Chief Deputy Attorney General

Keith R. Brady, Esquire
Assistant State Solicitor

David R. Anderson, Sr., Esquire

Phillip G. Johnson
Opinion Coordinator